

THE HONORABLE JAMES L. ROBERT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HONEYWELL INTERNATIONAL, INC., a
Delaware corporation, INTERMEC, INC., a
Delaware corporation, and INTERMEC
TECHNOLOGIES CORPORATION, a
Washington corporation,

Plaintiffs,

v.

DR. PAUL MALTSEFF,
f/k/a Pavel Maltsev, an individual,

Defendant.

No. 2:14-cv-00283-JLR

**DEFENDANT'S REPLY IN SUPPORT OF
MOTION TO COMPEL AND FOR
FURTHER RELIEF RE: DISCOVERY**

**NOTE ON MOTION CALENDAR:
September 12, 2014**

I. INTRODUCTION

Dr. Maltseff filed his motion to compel one week prior to the deadline for all discovery motions and just six weeks prior to the discovery cutoff. Dr. Maltseff did so because Plaintiffs still have not identified the confidential information that they claim is material to the patentability of pending Datalogic patent applications. They allege that Dr. Maltseff will be required to disclose their confidential information to the USPTO, but they then fail, despite discovery requests that have been pending for months, to identify the so-called confidential information that is in jeopardy. Plaintiffs acknowledge that they have failed to provide this information, even though Plaintiffs have had access to Datalogic's pending published patent applications since the inception of this case, had received a production of Datalogic's pending, unpublished patent applications more than 30 days ago, and had deposed Dr. Maltseff for seven hours over a month ago.

1 Plaintiffs' statement that their discovery responses are complete and accurate is untrue. For
 2 example, Plaintiffs identify 35 published Datalogic applications for which they contend Dr. Maltseff
 3 possesses confidential Intermec information that is material to patentability and is allegedly in
 4 jeopardy of being disclosed. Yet, when asked to identify that confidential information for each of the
 5 35 published patents, Plaintiffs to date have identified only one single item of allegedly confidential
 6 information for only one of the 35 published patent applications. Even for this single item they have
 7 not yet identified any produced documents disclosing the allegedly confidential information. There
 8 is no information provided for the other 34. There also is no information provided for any of the
 9 unpublished and pending Datalogic patent applications. Simply put, how can Dr. Maltseff defend
 10 himself against Plaintiffs' claim that he will be required to disclose Plaintiffs' confidential
 11 information because it is "material" to a Datalogic patent application when Plaintiffs fail or refuse to
 12 disclose the alleged confidential information that is allegedly in jeopardy on each application?

13 **II. DISCUSSION**

14 **A. Plaintiffs Cannot Justify Their Failure to Identify and Produce the Relevant** 15 **Confidential Information**

16 Dr. Maltseff's Motion to Compel established that Plaintiffs' answers to interrogatories and
 17 production of documents are critically deficient. Plaintiffs still have not identified or produced the
 18 confidential information that they claim is material to the patentability of Datalogic's published patent
 19 applications, and have not explained how such confidential information is material. *See, e.g.*,
 20 Response to Interrogatory Nos. 2 and 7. As to Datalogic's unpublished patent applications, Plaintiffs
 21 have made no effort whatsoever to answer any of the interrogatories or produce any documents. *Id.*

22 Plaintiffs' argument that they have "completely and accurately responded to the discovery
 23 requests at issue, in light of currently available information," is preposterous. Plaintiffs commenced
 24 this lawsuit in February, claiming that Dr. Maltseff possesses confidential information of Plaintiffs
 25 that is in jeopardy of being disclosed. It is now September and Plaintiffs are still arguing that they
 26 do not know their own trade secrets and confidential information.

1 Plaintiffs assert that they have answered Dr. Maltseff's interrogatories because they have
 2 "specifically identified thirty-five such patent applications," in response to Interrogatory No. 1. That
 3 interrogatory asks Honeywell to identify "all Datalogic patent application(s) for which Plaintiffs
 4 contend Dr. Maltseff possesses confidential information or trade secrets of Plaintiff(s) that he would
 5 be required to disclose to the USPTO as a result of his Rule 56 disclosure obligations." Opp. at 4.
 6 For those same 35 patent applications, Plaintiffs' provide essentially no answers to Interrogatory Nos.
 7 2 and 7 that call for the identification of the confidential information and an explanation as to why it
 8 is material to patentability. There are also no responsive answers to the other interrogatories and no
 9 production of documents relating to the allegedly material, confidential information. Similarly,
 10 where is Plaintiffs' identification of any unpublished Datalogic patent application(s) for which they
 11 claim Dr. Maltseff has material confidential Intermec information?

12 Plaintiffs argue that their answer to Interrogatory No. 8 "specifically identifies the inventions
 13 and patent application in question, and explains precisely how Dr. Maltseff's knowledge qualifies as
 14 prior art and is material to the patentability of Datalogic's invention." Opp. at 5. This answer
 15 identifies only one item of confidential information relating to only one patent application. If that is
 16 the only patent application and item of confidential information allegedly supporting their claim, then
 17 the parties can complete depositions and prepare summary judgment motions. If there are other patent
 18 applications and relevant items of confidential information, however, – and Plaintiffs' answer to
 19 Interrogatory No. 1 states that there are 35 patent applications at issue – then Plaintiffs must provide
 20 this information immediately as it is already untimely and long overdue.

21 Plaintiffs continue to argue that they are attempting to "reconstruct the information that Dr.
 22 Maltseff was exposed to during his tenure at Honeywell and compare that information to Datalogic's
 23 pending and unpublished patent applications, invention disclosures and related materials." Opp. at
 24 6. They argue: "Until Honeywell completes that investigation, virtually all of the information to
 25 which Maltseff was exposed from January 27, 2006 to December 31, 2013, is relevant to this litigation
 26 and is much too vast for Honeywell to recite in an interrogatory answer." *Id.* This argument fails on

multiple levels. First, Plaintiffs have already identified 35 Datalogic patent application for which they claim Dr. Maltseff has material, confidential information. What is that information, and why is it material? Second, this action has been pending for over six months. Where is the support for their initial allegations or any fruits of Plaintiffs' investigation to date? Third, the discovery period is ending, and the time to file discovery-related motions has now passed. Plaintiffs' timely and complete answers are long overdue.¹

B. Plaintiffs Fail to Substantiate any Undue Burden

Next, Plaintiffs argue that "some of Dr. Maltseff's interrogatories are extremely burdensome." But Plaintiffs' Opposition identifies only Interrogatory No. 6, which asks Plaintiffs to "identify with specificity each and every other or different trade secret and/or confidential information, if any, that Plaintiffs contend to be at issue in this action and which is not already identified in your response to Interrogatory No. 2." Opp. at 6. This is simply a catch-all discovery request. If there is confidential information that is allegedly material to patentability, then it should be identified in response to Interrogatory No. 6. If Plaintiffs contend that other, additional confidential information is relevant and in jeopardy of being disclosed by Dr. Maltseff, or if Plaintiffs intend to submit such information on the merits, they should be required to identify it in response to Interrogatory No. 6. No declaration has been submitted by Plaintiffs to substantiate any alleged burden, or to inform the Court about the investigation that Plaintiffs have undertaken to date, or why such identification and production could not have been timely completed.

C. Plaintiffs' Argument that Dr. Maltseff's Motion is Premature Ignores the Case Schedule and Plaintiffs' Delay to Date

Plaintiffs' argument that Dr. Maltseff is "impatient" and that his motion is "premature" ignores the case schedule and Plaintiffs' delay to date. Dr. Maltseff served his revised discovery requests in May. The parties agreed to a hiatus while the Court ruled on Dr. Maltseff's Motion for

¹ Dr. Maltseff's discovery requests relate to Datalogic's patent applications, which Plaintiffs already have. To respond to those discovery requests, Plaintiffs do not need the Datalogic invention disclosures and communications related to those disclosures which Datalogic is assembling for its supplemental production.

Summary Judgment. That ruling came out on July 9, but Plaintiffs did not provide their discovery responses until August 15, asserting unilaterally that they were entitled to an additional 18 days after receiving Dr. Maltseff's responses. When the responses were finally produced, they were inadequate on their face. At the meet and confer on August 26, Plaintiffs' counsel requested that Dr. Maltseff defer his motion because the deadline for discovery-related motions would not expire for another 10 days and they planned to supplement. Tellingly, those 10 days and more have now passed and no supplementation was made. Dr. Maltseff has been incredibly patient. He has been waiting six months to discover the basis, if any, for Plaintiffs' claims. It is absurd to argue that Dr. Maltseff's motion is premature when the deadline for such motions has expired.

Plaintiffs dig themselves into an even deeper hole with their hollow excuse that Plaintiffs' discovery responses were delayed because of the time incurred negotiating a protective order. Plaintiffs' discovery responses contain only a small number of lines of information in their answer to Interrogatory No. 8 that they have designated as confidential. Nothing prevented Plaintiffs from providing the rest of their discovery responses before the protective order was entered. *See* Supplemental Declaration of Paul R. Raskin (submitting Plaintiffs' complete answer to Interrogatory No. 8).²

Finally, Plaintiffs' argument that Dr. Maltseff's counsel "took an unusually aggressive and drawn-out approach to negotiating the Stipulation for Protective Order in this case," is not supported by any declaration and should not be well received. Opp. at 2. In fact, the negotiation of that order was delayed because Plaintiffs' counsel demanded late in the process that the protective order include a broad and far reaching "prosecution bar order" that would have precluded any expert or attorney exposed to AEO information from prosecuting patents in broad technology areas. Ultimately,

² The Supplemental Raskin Dec. and Answer to Interrogatory No. 8 will be filed after counsel have an opportunity to confer regarding Plaintiffs' AEO designation and whether Plaintiffs require a filing under seal. The single item of information designated as confidential relates to Plaintiffs' argument that Dr. Maltseff has knowledge of a conception date for an invention contained in a pending Intermec patent application that they claim is prior art to a pending Datalogic patent application. Even for this item of confidential information, Plaintiffs have not even identified the purported conception date and it remains questionable why this information (which has no value if kept secret) has been designated as confidential. Dr. Maltseff disputes that the conception date would be material.

1 Plaintiffs removed the restriction and agreed to narrow the language of that bar order. *See* Declaration
 2 of William Cronin.

3 **D. The Court Should Issue a Limiting Instruction if Plaintiffs Fail to Comply**

4 In addition to compelling Plaintiffs to answer interrogatories and produce documents, the
 5 Court should issue an order advising Plaintiffs that they will not be allowed to rely at summary
 6 judgment or trial on any responsive information that is not timely disclosed in response to the Court's
 7 order on this motion. Plaintiffs concede that a limiting instruction may be issued when a party "fails
 8 to obey an order to provide or permit discovery." Opp. at 8 (quoting Rule 37). Plaintiffs have not
 9 and cannot justify their failure to identify the confidential information that they claim is material to
 10 the patentability of 35 pending Datalogic patent applications. Nor is their failure to comply with their
 11 discovery obligations harmless. Dr. Maltseff cannot meaningfully complete depositions, prepare
 12 comprehensive summary judgment motions, or fully prepare for any trial, if Plaintiffs are allowed to
 13 sandbag him with a belated identification of the alleged foundation for their claim.

14 **III. CONCLUSION**

15 For the reasons stated in Dr. Maltseff's motion and above, Dr. Maltseff's Motion to Compel
 16 and for Further Relief Re: Discovery should be granted.

17 DATED this 10th day of September, 2014.

18 CORR CRONIN MICHELSON
 19 BAUMGARDNER & PREECE LLP

20 *s/ William F. Cronin*

21 William F. Cronin, WSBA No. 8667
 22 Paul R. Raskin, WSBA No. 24990
 1001 Fourth Avenue, Suite 3900
 23 Seattle, WA 98154-1051
 (206) 625-8600 Phone
 wcronin@corrchronin.com
 praskin@corrchronin.com
 24 ***Attorneys for Defendant***

CERTIFICATE OF SERVICE

I certify that on September 10, 2014, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record for the parties.

s/Leslie Nims
Leslie Nims